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No. 00-160

IN THE

Supreme Court of the United States

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION and
TENASKA IV TEXAS PARTNERS, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT TENASKA IV TEXAS PARTNERS, LTD. IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission ("FERC") reasonably interpreted the statutory requirement that a qualifying cogeneration facility ("QF") produces "useful energy," 16 U.S.C. § 796 (18)(A)(ii), when it determined that distilled water produced by a QF in a common commercial process for sale to a third party is presumptively useful, without thereafter considering in response to a petition to revoke a previously granted QF certification either the economics of such sales or the downstream uses of the distilled water?

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COUNTERSTATEMENT OF THE CASE

A. The Parties and Their Positions

In the early 1990s, Petitioner Brazos Electric Power Cooperative, Inc. ("Brazos"), which generates electricity for its member cooperatives, determined that it would face a shortage of generating capacity beginning in 1997. R. 463. Brazos considered several different options for obtaining sufficient supplies of electricity to meet this shortage. Brazos considered building and owning additional generating facilities; buying electricity from utilities in Texas at tariff rates approved by the Public Utilities Commission of Texas ("PUCT"); buying electricity from outside of Texas; and a proposal by Respondent Tenaska IV Texas Partners, Ltd. ("Tenaska")[1] under which Tenaska would build and own a generating facility and sell its electric output to Brazos. R. 419, 463, *infra* at 6. Brazos accepted Tenaska's proposal because it met Brazos's needs at the lowest cost. R. 463, 465, 477-78, *infra* at 6-7. Brazos and Tenaska then negotiated a long-term power purchase agreement.

At that time, it was important to both Tenaska and Brazos that the generating facility be certified as a "qualifying cogeneration facility" or "QF" under Section 3(18) of the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 796(18) (1994). This was important to Tenaska because, at that time in Texas, only QFs could be built as non-utility generating plants. R. 463, 471. Also, as the owner of a QF,

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[1] Tenaska is a privately-held limited partnership that is wholly owned by Ponderosa Pine Energy, LLC, and ECT Merchant Investments Corp. The latter is an affiliate of Enron Corp., whose stock is publicly traded on the New York Stock Exchange.

Tenaska would not be subject to many of the provisions of the Federal Power Act, the Public Utility Holding Company of 1935 or state utility regulation. 16 U.S.C. § 824a-3(e) (1994); 18 C.F.R. §§ 292.601(c) and 292.602(c)(i) (1998).

Establishing the generating plant as a QF also was important to Brazos because certification of the power purchase agreement by the PUCT was available only if the agreement was with a QF. Certification by the PUCT assured Brazos of recovery of its purchased power costs. R. 91. Establishing the generating plant as a QF also would permit Tenaska to require Brazos to interconnect with the plant and to purchase its output at Brazos's fully avoided costs.[2] 18 C.F.R. §§ 292.303(a) and 304(a)(2) (1998); *see generally, American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

To be a QF Tenaska's generating plant had to produce electric power and "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. § 796(18). FERC has consistently interpreted 16 U.S.C. § 796(18) to mean that the usefulness of the energy would be conclusively established if the energy is used in a common process. *Electrodyne Research Corp.*, 32 F.E.R.C. ¶ 61,102 (1985). In 1993, FERC had determined that the production of heat for the purpose of distilling water was a common process. *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. ¶ 61,230 (1993).

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[2] "Avoided costs" are a utility's incremental costs for electric energy or capacity which, but for the purchase from the QF, the utility would generate itself or purchase from another source. *See* 18 C.F.R. §§ 292.101(b)(6) and 292.304(b)(2) (1998).

Tenaska designed the plant to meet these standards using the thermal output of the plant to produce distilled water that would be sold to an independent third party. To that end, Tenaska entered into a contract in 1994 with the City of Cleburne, Texas. The contract provided that the City would purchase all of the distilled water produced by the plant. But the contract also obligated Tenaska to purchase from the City all of its water for use in the plant's steam generators and all of its effluent water for use in the plant's cooling towers. The City was obligated to construct the facilities necessary for transporting the effluent water to, and the distilled water from the plant. In addition, the City was responsible for construction financing of the plant, through issuance of tax-exempt municipal bonds, for which reimbursement from Tenaska is received in monthly payments when debt service is due.

Tenaska sought certification from FERC that its plant would be a "QF" on the ground that the plant's thermal output would be used to distill water -- a common use -- which would be sold to an independent third party. Neither Brazos nor the City of Cleburne opposed certification of the plant. FERC granted Tenaska QF certification on that basis. *Tenaska IV Texas Partners, Ltd.*, 70 F.E.R.C. ¶ 62,026 (1995).

Tenaska's facility began commercial operation in January 1997 and has produced electricity, all of which has been and is being sold to Brazos pursuant to the power purchasing agreement. In addition, the distilled water produced at the plant has been and is continuing to be sold pursuant to the contract between Tenaska and the City. The City wanted the water to be able to attract new industries at a nearby industrial park, but not until September 1997 did the City attract a new industry to the

park. *Brazos Elec. Power Coop. v. Tenaska IV*, Pet. App. A at 8a-9a, 205 F.3d 234, 239 (5th Cir. 2000). In the interim, the City planned to use the distilled water to augment the flow of an otherwise stagnant local stream to improve public health and safety, but difficulties were encountered in obtaining the necessary federal and state permits. *Id.* As a result, for the first few months of the plant's operation, the City had no use for distilled water and discarded it. But within a few months, the City began delivering distilled water to a buyer. *Id.*

After the plant was operational, Brazos initiated litigation on several fronts in an effort to invalidate its contractual obligations to Tenaska.[3] Among other things, Brazos filed a petition at FERC to revoke the plant's QF status. According to Brazos, the sale of distilled water to the City was not "useful" within the meaning of FERC's QF regulations, 18 C.F.R. § 292.202(c), because Tenaska allegedly received only a monthly credit on its water supply bill of $10 for thousands of gallons of distilled water and also because the City did not resell the distilled water it received until a few months after the facility became operational.[4]

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[3] In addition to the litigation before FERC, Brazos initiated litigation before the PUCT and the District Court of Tarrant County, Texas, No. 67-170034-97. The PUCT rejected Brazos's claims. *Complaint of Brazos Elec. Coop., Inc.*, Order Dismissing Complaint, Docket No. 17878 (Texas PUC) (Nov. 6, 1997). The District Court litigation is in abeyance.

[4] Brazos also alleged that (a) the treatment of the steam in Tenaska's facility did not comply with governing FERC regulations, and (b) Tenaska did not satisfy QF ownership requirements. FERC declined to grant Brazos's petition on either of these grounds. Before the Fifth

FERC denied Brazos's petition, explaining that when a cogeneration plant's thermal output involves a common industrial or commercial application, such output is presumptively useful and no further analysis is performed. FERC noted that because it had already concluded that the production and sale of distilled water to third parties from a cogeneration plant is a common practice in the industry, the presumption applied. Moreover, since there is no statutory requirement that FERC determine whether such thermal output is being used in an economic manner or the downstream purpose for which the output is used, it would not entertain further inquiry into the economics of the downstream uses of presumptively useful thermal outputs such as distilled water. *Brazos Elec. Power Coop. v. Tenaska IV Texas Partners, Ltd.*, Pet. App. C at 53a, 83 F.E.R.C. ¶ 61,176 (1998).

Brazos filed a petition for rehearing, alleging that because the plant's distilled water was not actually being sold or put to a *bona fide* use, FERC should reconsider its position. FERC accepted Tenaska's representation that the $10 credit was but "one part of a multifaceted financial package" between Tenaska and the City, and thus found that commercial sales to a third party were in fact occurring. FERC also found that because it is common to use a cogeneration plant's thermal output to produce distilled water, such use is in fact a *bona fide* use. Accordingly, FERC denied Brazos's rehearing petition. *Brazos Elec. Power Coop. v. Tenaska IV Texas Partners, Ltd.*, Pet. App. B at 41a, 85 F.E.R.C. ¶ 61,097 (1998).

Circuit, Brazos challenged FERC's orders as to the second issue. The Court of Appeals affirmed. Pet. App. A at 27a. Brazos does not challenge this aspect of the decision below.

B. The Fifth Circuit's Affirmance of FERC Orders

Brazos next sought review in the U.S. Court of Appeals for the Fifth Circuit, re-arguing the same issues. Following *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"), and *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974), the Court of Appeals upheld FERC's Orders. Pet. App. A at 1a. Rehearing was also denied. Pet. App. D at 66a.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Any Issue of National Importance.

This case does not present any issue of national importance. FERC's application of a presumption to determine the usefulness of a form of energy under 16 U.S.C. § 796(18) is not the subject of any other pending cases in the Courts of Appeals, nor has it been the subject of any prior case in any Court of Appeals.

Brazos attempts to cloak this case with national importance by claiming that "[t]he cost to consumers of compulsory electricity purchases from PURPA qualifying facilities is enormous." Pet. at 12 n.5. But this case does not involve a compulsory purchase from a QF. As explained above, before entering into the purchase power agreement with Tenaska, Brazos considered several different ways of obtaining sufficient supplies of electricity to meet its generating capacity shortfalls. R. 244-319, 477-78, *supra* at 1. Brazos accepted Tenaska's proposal and negotiated a power purchase agreement

with Tenaska because Tenaska would supply power at the lowest cost. R. 478, *supra* at 1. Thus, Brazos was never forced to enter into a contract with Tenaska; the contract was the result of arms-length negotiations after Brazos selected Tenaska's proposal as the most favorable.

This case does not even involve the fully avoided-cost rule under which a QF can by law compel the utility purchasing the QF's power to pay an amount equal to the utility's full avoided costs. Rather, the rate being charged by Tenaska for electric energy sold to Brazos is the product of good faith, arm's-length negotiations between Tenaska and Brazos. R. 471, *supra* at 1.[5]

This case is really about Brazos's attempt to get out of its contract with Tenaska because Brazos no longer views the contract as favorable to it. Brazos believes it can now purchase electric energy at lower prices than the prices in the contract and has initiated litigation on several fronts in an effort to be released from its agreement with Tenaska. But that effort has nothing to do with alleged PURPA abuse, for Brazos would be in the same position whether or not Tenaska's generating facility is a QF. Brazos's commercial concerns do not provide a conceivable reason for issuance of the writ.

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[5] These facts belie Brazos's contention that this case is the "poster child example of PURPA abuse that forces electricity consumers -- residential, commercial and industrial -- to pay higher electric rates, of billions of dollars per year, in order to subsidize independent power producers." Pet. at 18 n.7 (internal quotations omitted).

II. This Case Involves the Implementation of Well-Established Principles, Not the Establishment of New Principles.

Brazos's basic complaint is that FERC conclusively determined the thermal output of Tenaska's facility to be "useful" because it was used in a common process to produce distilled water, thereby foreclosing inquiry into the value of the distilled water to the City. The resolution of this complaint does not turn on principles which are in doubt. The principles here are well-established. All that is involved is the implementation of these principles to the circumstances of this case.

This Court has recognized that an administrative agency may use irrebuttable presumptions as evidentiary rules of law to further a particular legal or policy goal if the presumptions are reasonable and compatible with the underlying statutory scheme. *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 378 (1998). The presumption at issue here has two parts. The first is that the thermal output of a facility is "useful" within the meaning of 16 U.S.C. § 796(18)(a)(2) if it is used in a common industrial or commercial application or used to produce a common product. *Bayside Cogeneration, L.P.*, 67 F.E.R.C. ¶ 61,290, at 62,006 n.4 (1994); *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. ¶ 61,320, at 63,158 (1993). The second part is that the use of a facility's thermal energy output to produce distilled water is "common." *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. at 63,158. This two-part presumption is both reasonable and compatible with the statutory scheme.

The test for determining whether a facility's thermal energy output is "useful" within the meaning of 16 U.S.C. §

796(18)(a)(ii) is an economic test..*Electrodyne Research Corp.*, 32 F.E.R.C. ¶ 61,102, at 61,279 (1985). FERC generally relies on the marketplace to determine whether the thermal energy output is economically "useful." *Electrodyne*, 32 F.E.R.C. at 61,278 (1985) ("the ultimate determination of usefulness will be made in the marketplace"). Because a use of thermal energy output would not be a common practice in the industry unless it was economically useful in a market, FERC reasonably concludes that a "common" use of thermal energy output is economic. *Bayside Cogeneration,* L.P., 67 F.E.R.C. ¶ 61,290, at 62,005-06 (1994).[6]

FERC determines that a use is common if it has received sufficient applications proposing the same use for the thermal energy output because this shows that the technology involved is then established and that the thermal energy output is "useful." *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. at 63,158; *Arroyo Energy, L.P.*, 63 F.E.R.C. ¶ 61,198, at 62,545 (1993); *Polk Power Partners, L.P., et al.*, 61 F.E.R.C. ¶ 61,300, at 62,128 (1992). FERC determined that thermal energy output is useful if it is used to produce distilled water, after receiving five applications proposing this use. *Kamine/Besicorp Allegany*

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[6] If the use of a facility's thermal energy output is uncommon, *i.e.*, one that involves a new technology or creates an end-product without an established market, FERC considers the statutory standard met if the output or product made by the output is sold to a non-affiliated third-party because FERC correctly assumes that no entity would buy the thermal energy unless it served a legitimate purpose. *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. at 61,158. It is only if there is no market for the output, because the output is sold to an affiliate or is used by the generator itself, that FERC requires quantitative evidence that the use is economically justified. *Polk Partners, L.P.*, 61 F.E.R.C. ¶ 61,030, at 61,163-64.

L.P., 63 F.E.R.C. at 61,158. Thus, the presumption of "commonality," for the production of distilled water as well as other uses, is based on what is actually happening in the industry. This too is entirely reasonable.

The crux of Brazos's argument is that to satisfy the statutory standard, FERC must determine that the end-product of a cogenerator's thermal energy output is valuable in the hands of the purchaser. Pet. at 22. This argument is not grounded in the text of the statute. To meet the statutory test, a facility must produce "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes." 16 U.S.C. § 796(18)(A)(ii) (1994). Nowhere in the statute is it required that the usefulness standard be determined by the purchaser's use of the end-product. Therefore, in accordance with this Court's opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("*Chevron*"), "the question is whether the agency's answer is based on a permissible reading of the statute." FERC's reading of the term "useful" is a permissible one, as the Fifth Circuit found. 205 F.3d at 244. This is clearly correct.

The purpose underlying PURPA is to encourage the development of cogeneration facilities. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982) ("Section 210 of PURPA's Title II . . . seeks to encourage the development of cogeneration and small power production facilities"); *see also* H.R. Conf. Rep. No. 1750 at 98, *reprinted in* 1978 U.S.C.C.A.N. 7797, 7832 ("The establishment of utility type regulation over [qualifying cogeneration facilities] would act as a significant disincentive to firms interested in cogeneration . . ."). Congress entrusted to FERC the task of ensuring this statutory purpose: "[T]he

Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration . . . ." 16 U.S.C. § 824a-3(a) (1994).

Examining the value of a facility's thermal energy output in the hands of the purchaser (in this case, the City) as Brazos urges would undermine the statute's purpose, as well as FERC's mandate to develop rules to encourage cogeneration, because the certainty firms need to invest in these projects would be lost. For example, suppose that in this case, the City had a buyer for its distilled water at the time Tenaska began commercial operation, but another seller of distilled water entered the market and sells water at a lower price than the City, thus displacing the City's sales. Through no fault of Tenaska, which had a purchaser for its thermal energy output, the economic value of the end-product would be diminished, thereby undermining the QF status of the plant under Brazos's interpretation of the statute. If such a turn of events could potentially frustrate the status of the facility as a QF, the incentive to invest would be severely reduced. FERC's decision not to evaluate the secondary market of every third-party purchaser of QF power is clearly a permissible reading of the statute and was appropriately upheld as such by the Fifth Circuit. Pet. App. at 20a-21a.

Brazos's claims that FERC did not follow its precedent in applying a presumption in this case are wholly inaccurate. The Fifth Circuit fully analyzed the relevant case law and properly disposed of those arguments. The Fifth Circuit reviewed the agency's action and upheld it under *State Farm*, 463 U.S. at 43. Such a garden-variety implementation of black-letter administrative law does not warrant review by this Court.

III. The Rationale Used to Affirm FERC's Orders Was Also Used by FERC to Deny Brazos's Petition.

Brazos argues that the Court of Appeals decision is defective because it "supplies a rationale not used by the FERC." Pet. at 16. However, Brazos does not identify with sufficient clarity the alleged rationale the Fifth Circuit used to uphold FERC's orders that was not articulated by FERC itself. *See* SUP. CT. R. 14(4) (requiring a petitioner to plead "with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration"); *see, also, Mazur v. Stein*, 347 U.S. 201, 206, n.5 (1954) ("The fact that the issue was mentioned in argument does not bring the question properly before [the Court]"). For that reason alone, the Court should not consider this argument.

In any event, Brazos may be referring to its claim that FERC's "only given justification for the irrebuttable presumption was the suggestion that the possibility of hearings . . . would discourage cogeneration," while the Fifth Circuit justified the irrebuttable presumption as necessary "'to enable cogeneration facilities to obtain financing' by providing investor certainty." Pet. at 15, *citing* 205 F.3d at 246. There is no distinction in these statements. In the context of this case, the evidentiary hearing would be a post-certification challenge to the QF. FERC has noted that the "financeability" of QF projects "would be severely hampered" if post-certification challenges could be brought, a result not "consistent with Congress' directive that we encourage the development of QFs." *New York State Elec. & Gas Corp.*, 71 F.E.R.C. ¶ 61,027, at 61,118 (1995), *reconsideration denied* 72 F.E.R.C. ¶ 61,027 (1995), *petition for review dismissed* 117 F.3d 1473 (D.C. Cir. 1997).

The Fifth Circuit made the same point directly. Pet. App. A at 23a.

Accordingly, the writ should be denied because the Court of Appeals upheld FERC's orders on the basis of a rationale that was clearly articulated and specifically relied upon by the agency itself. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

IV. There is No Conflict Among the Circuits.

Contrary to Brazos's claim (Pet. at 13), there is no conflict among the Circuits. The decision Brazos points to as in conflict with the decision below, *Southern California Edison Co. v. FERC*, 195 F.3d 17 (D.C. Cir. 1999), involved a different provision of PURPA and a different question of law. At issue there was 16 U.S.C. § 796(17)(A)(i), which provides an exhaustive list of primary energy sources a "small power production facility" may use to produce electricity. FERC had certified a facility that primarily used an energy source for purposes not listed in the statute.

The court rejected FERC's action. The court noted that the purpose of PURPA was to encourage the development of small production facilities, just as it is to encourage the development of cogeneration, but concluded that the purpose was not enough to overcome the "text, structure and context of the statute," which left "no ambiguity to resolve at step two of *Chevron*." *Southern California Edison Co. v. FERC*, 195 F.3d at 27; *cf. American Petroleum Inst. v. EPA*, 198 F.3d 275, 278 (D.C. Cir. 2000) ("[I]f Congress makes an explicit provision for

apples, oranges and bananas, it is most unlikely to have meant grapefruit").

The case, in short, was a classic *Chevron* step-one case, in which the statute answers the precise question. As noted above, 16 U.S.C. § 796(18)(A)(2), which is at issue in this case, does not speak to the precise question. The statutory interpretation issue in this case is therefore a classic *Chevron* step-two question of whether the agency has given a permissible interpretation of the statute, and here FERC has. There is no conflict.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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